No. 85-5939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EULOGIO CRUZ,

Petitioner,

v.

NEW YORK,

Respondent.

On Writ Of Certiorari To The Court Of Appeals Of The State Of New York

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the introduction at a joint criminal trial of the nontestifying codefendant's confession, which factually overlapped with petitioner's own alleged confession but which was far more damaging to petitioner's case, violated the rule of *Bruton* v. *United States*, 391 U.S. 123, that the admission of the nontestifying codefendant's confession, even with limiting instructions that the codefendant's confession is admissible only against the codefendant, deprives a defendant of his rights under the Confrontation Clause.

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OPINIONS BELOW

The opinion of the New York Court of Appeals (J.A. 74-91)[1] is reported at 66 N.Y.2d 61, 495 N.Y.S.2d 14, 485 N.E.2d 221 (1985). No opinion was rendered by the Supreme Court of the State of New York, Appellate Division, First Department, in its decision (J.A. 71) affirming the judgment against petitioner. 104 A.D.2d 1060, 481 N.Y.S.2d 934 (1st Dept. 1984). The opinion of the Supreme Court of the State of New York, Bronx County (Eggert, J.) (J.A. 22-26), is reported at 119 Misc. 2d 1080, 465 N.Y.S.2d 419 (1983).

JURISDICTION

The order of the New York Court of Appeals (J.A. 73) was entered on October 17, 1985. The petition for a writ of certiorari was filed on November 29, 1985, and was granted on June 9, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

The Fourteenth Amendment to the Constitution of the United States provides:

> Section 1 . . . "nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

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[1] Numerals preceded by "J.A." refer to the pages of the Joint Appendix.

STATEMENT OF THE CASE

Introduction

During the early morning hours of November 29, 1981, the police in Bronx County found gas station attendant Victoriano Agostini lying mortally wounded on the station's office floor with two bullet wounds to the head.

Five months later, the police were investigating a different homicide, the killing of one Jerry Cruz (no relation to petitioner). Jerry's brother, Norberto, suspected Eulogio Cruz of having been responsible for his brother's death. Norberto told the police that five months before, on November 29th, Eulogio and Eulogio's brother, Benjamin Cruz, had come to his apartment and had said that they had killed a gas station attendant during a robbery attempt.

Shortly thereafter, an assistant district attorney took a detailed videotaped confession from Benjamin Cruz, in which Benjamin implicated Eulogio. When later arrested, Eulogio made no statement to the authorities.

Eulogio and Benjamin were indicted in New York Supreme Court, Bronx County, for felony murder (N.Y. Penal Law § 125.25[3])[2] and lesser related offenses in connection with the gas station homicide. Upon the People's motion, their cases were consolidated for trial.

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[2] New York Penal Law § 125.25 (subd. 3) states in pertinent part:

A person is guilty of murder in the second degree when:

3. Acting either alone or with one or more other persons, *he commits or attempts to commit robbery*, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree, and in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another participant, if there be any, causes the death of a person other than one of the participants. . . . [Emphasis supplied.]

Eulogio's pretrial motion to sever based upon *Bruton* v. *United States*, 391 U.S. 123 (1968), was denied.

At the joint trial, there were no eyewitnesses to the robbery/homicide. The only direct incriminating evidence against either defendant was their alleged oral confessions to Norberto Cruz, and Benjamin's videotaped confession. Both defendants were found guilty of felony murder. Eulogio's judgment of conviction was affirmed on appeal.

First Trial And Motions For Severance

After Benjamin Cruz's pretrial motion to suppress his videotaped confession was denied, counsel for Eulogio Cruz moved to sever the cases of the two defendants on *Bruton* grounds. The court reserved decision and ordered the trial to proceed (J.A. 14-17). At the first trial, before Justice Eggert, the People introduced the videotaped confession and Norberto Cruz testified to the defendants' alleged admissions to him the day of the slaying. Neither defendant testified. Petitioner renewed his *Bruton* argument, but the court denied a severance (J.A. 18-21).

In its written decision (J.A. 22-26), the court found that petitioner's confession to Norberto Cruz and Benjamin's videotaped confession "interlocked" in terms of factual content. The court acknowledged that there was a radical difference between the confessions as to the evidence that they were actually uttered (J.A. 24). It held, however, that for two confessions to come within the "interlocking confessions" exception to the *Bruton* rule, there was no requirement in New York case law or this Court's decision in *Parker* v. *Randolph*, 442 U.S. 62 (1979), that "they interlock as to anything else, such as the persons to whom the confessions were made, the circumstances of making,

and the reliability of the evidence that the confessions were actually made" (J.A. 25).

The first trial ended in a mistrial because of juror misconduct. Prior to the second trial, counsel again moved for a severance. Justice Cerbone denied the motion based upon Justice Eggert's previous decision (J.A. 27-28).

Accordingly, on September 27, 1983, both defendants jointly proceeded to trial before Justice Cerbone and a jury.

Second Trial

At 5:15 a.m. on November 29, 1981, Police Officers *Dennis Fitzpatrick* and Ronald Zuba drove to the Gasteteria service station in response to a radio report. Upon arrival, Fitzpatrick saw the attendant, Victoriano Agostini, lying on the office floor and bleeding from the back of his head. Agostini was taken to the hospital (T. 35-39).[3] At 8:00 a.m., Detective *Patrick Cirincione* of the police Crime Scene Unit arrived at the gas station. He found blood on the office floor and photographed the scene. No firearms or spent shells were recovered (T. 180-189).

The following day, an autopsy performed on the deceased by Associate Medical Examiner Dr. *John Pearl* revealed the cause of death to be two gunshot wounds to the head. One of the bullets entered the head above the right ear from a distance of three to six inches. The second bullet entered the left front part of the head. The paths of both wounds were "backward, downward," and toward the right. Additionally, the deceased had blunt force injuries on the bridge of the nose, around his eyes, and on his right cheek and left shoulder. The bullet and bullet fragment recovered during the autopsy were .38 caliber projectiles which, according to ballistics expert Detective *Stephen Colangelo*, could have been fired from a .357 magnum handgun (Pearl T. 223-225, 229, J.A. 52-53; Colangelo T. 235-237, J.A. 54).

[3] Numbers preceded by "T" refer to the minutes of the second trial, dated September 27-October 5, 1983.

Defendants' Alleged Statements To Norberto

One Jerry Cruz (no relation to the defendants) was killed on March 15, 1982. Detective *George Wood* was assigned to investigate. On March 16, Wood met with Norberto Cruz, Jerry's brother (T. 192, 206). After having had several conversations with Norberto over the space of more than a month, Wood conversed with him again on April 27, 1982. For the first time, Norberto told Wood of the defendants' alleged visit to his apartment on the 29th of the previous November and statements concerning the gas station homicide (T. 208-209).

Norberto Cruz, age 32, testified that he had been friends with Benjamin Cruz for 15 years and Eulogio Cruz for 25 years (J.A. 31-32). On November 29, 1981, at about 10:00 a.m., Benjamin and Eulogio came to the Bronx apartment which Norberto shared with his common-law wife and children (J.A. 32; T. 122).

Norberto claimed that Eulogio was nervous and had a bloody bandage around the inner part of his right forearm, and that Eulogio declined Norberto's offer to take him to a hospital (J.A. 32-33, 35). The People introduced no evidence, physical or otherwise, to support Norberto's claim that Eulogio suffered an injury to his right forearm. (According to Benjamin's videotaped confession (J.A. 67), the attendant had shot Eulogio in the *left* arm, not the right as Norberto's testimony would have it.)

According to his trial testimony, at this visit Norberto asked Eulogio what had happened, and the response was as follows:

> Q. What did [petitioner] tell you?
>
> A. That they had gone to give a hold up to a gas station and that he started struggling with him.
>
> THE COURT: Excuse me, speak up. Raise your voice.
>
> A. He started fighting with the man and the man bent down. He took out a gun and fired and then Benjamin jumped and fired at the man in the gas station (J.A. 33).

Benjamin then told Norberto his version: Eulogio had sent him to search the attendant but he did not search the man correctly. The attendant, while Eulogio and Benjamin argued, pulled out a gun. After the attendant fired at Eulogio, Benjamin shot the attendant (J.A. 34).

Norberto was impeached, however, with his testimony at the first trial. When asked at that trial who had said what, Norberto testified: "I asked Chino [Eulogio] what had happened, Benjamin spoke" (J.A. 50).

At about 4:00 p.m. the next day, Benjamin came to Norberto's apartment alone (J.A. 35, 41). Benjamin told Norberto to clean the blood off the car because it was dangerous for Norberto's brother Jerry (J.A. 36). (According to Benjamin's videotaped confession, Jerry Cruz was one of the four members of the team that had held up the gas station (J.A. 65).)

The defendants' visit with Norberto on November 29th lasted for about an hour (J.A. 32). At first, Norberto testified that no one else was present in the apartment at the time (J.A. 34). Norberto subsequently testified, however, that Jerry was also present. Eulogio and Benjamin had waited for Jerry to get dressed, then had left with him (J.A. 35, 40-41).

Jerry had lived with Norberto. Norberto claimed not to have known what Jerry had done for a living. Jerry would sometimes give Norberto money for the household; Norberto had never asked about the money's source (J.A. 40-41).

Norberto claimed that he had not told anyone about the November 29, 1981, visit from the defendants because, Norberto testified, "My brother had the event" (J.A. 45). Norberto went to the police, however, after Eulogio took him to the place where his brother died (J.A. 47). At another point Norberto was asked:

> Q. When is the first time you told the police that Eulogio said something to you?
>
> A. That was in [sic] March 14th[4] when Eulogio tried to take me to the place where they had killed my brother (J.A. 46).

Norberto nonetheless claimed that he had volunteered his information to Detective Wood because he was a "good citizen" (J.A. 48).

Norberto admitted to an eight-year-old conviction for driving without a license (J.A. 36-37). For the past ten years, he was a self-employed auto mechanic, practicing

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[4] As Detective Wood testified, Jerry Cruz was killed on March *15*th.

Moreover, Norberto did not in fact remember whether he had told Detective Wood about the November 29th visit during his first conversation with him or later (J.A. 49-50). However, Norberto also testified that he had already spoken to Wood on several occasions before he finally told Wood of that visit (J.A. 48-49).

his trade "in the street," rather than in a shop. That was his only source of income (J.A. 38-39). He recalled testifying at the first trial, however, that he had not worked for the past two years—"since I was suspended from work"—and had been receiving welfare payments during that period (J.A. 38-39).

Benjamin's Videotaped Confession

During his investigation of the Jerry Cruz homicide, Detective Wood made several attempts to contact Benjamin Cruz. On May 3, 1982, Wood met with Benjamin at the 48th precinct with Officer *Peter Ronda* acting as Spanish interpreter (T. 192-194, 210). When Ronda asked him what he knew about the death of Jerry Cruz, Benjamin, rather than answering the question, blurted out: "I shot a guy who shot my brother, Chino in a gas station on 149th" (T. 66-70, 81-82, 95; J.A. 29-30). Later, Bronx County Assistant District Attorney Allen Karen came to the precinct to take Benjamin's videotaped confession (T. 214).

The videotape came into evidence as People's Exhibit 4, over the objection of Eulogio's attorney, and was played for the jury (J.A. 30-31).[5] In the statement, elicited through questioning, Benjamin related the following version of the gas station homicide/robbery:

Benjamin, his brother "Chino" (Eulogio), Jerry Cruz, and one "Pacho" drove to the gas station. Jerry was the driver. They told the attendant to put only one gallon

[5] Prior to the playing of the tape, the court summarily denied the motion by Eulogio's attorney to redact the tape to delete all references to his client (J.A. 30). The only portion of the tape which was redacted was Benjamin's reference at one point to unrelated crimes (T. 117-118).

in the tank. Benjamin then took out a gun, and Eulogio, speaking Spanish, announced the robbery (J.A. 63, 65-66).[6]

While Jerry stayed in the car, the other three went into the office with the attendant. Benjamin had a .357 magnum, Eulogio a .38 caliber long, and Pacho a .38 caliber short handgun. They asked the attendant for his money. The attendant, answering in Spanish, told them, "[T]his is not my money to give away." Eulogio told him that if he did not hand over the money, he would kill him (J.A. 63-65, 67).

Eulogio then said, "Give me all your money," and hit the attendant "on top of the nose" with his gun (J.A. 63). Eulogio and the attendant started fighting. Benjamin went to the office door and asked the attendant to open it. Eulogio and the attendant were still fighting and the latter reported that he could not open it (J.A. 63-64). Pulling out his own gun, a .22, the attendant shot Eulogio once in the left arm. Eulogio again hit the attendant with his gun, then shot at the attendant "like to burn the clothes very close" (J.A. 63-64, 67).

Benjamin told Eulogio to open the door. Instead, Eulogio "threw the gun to the door." Benjamin asked Eulogio to open it, but Eulogio said that he could not. The attendant picked up the thrown gun "like to hit Chino in the head." Benjamin himself opened the door and said to Eulogio "look out." Benjamin extended his arm over his brother's shoulder, pointed his gun at the attendant, and from "very close" range shot him "right between the

[6] The written transcript of this confession appears in the Joint Appendix at J.A. 61-69. This transcript was originally prepared by the Bronx County District Attorney's Office and was part of the certified record before the New York Court of Appeals.

eyes." The attendant fell backward; the men ran away (J.A. 63-65).

The net proceeds of the robbery were $62, which they spent. Benjamin sold the murder weapon for $250. They threw the attendant's .22 caliber handgun away (J.A. 65-68).

The videotaped confession lasted for 22 minutes (J.A. 61, 69).

* * *

Defendant Eulogio Cruz did not present any evidence or offer any testimony. Benjamin Cruz presented two witnesses.

Officer Fitzpatrick's partner, Police Officer *Ronald Zuba*, echoed his partner's version of how they discovered the victim's body at the gas station (T. 274-275). Benjamin's mother, *Lucinda Ramos*, testified that Benjamin had never gone beyond the 5th grade in school, was "dull for his age," and had psychiatric problems (T. 283-284, 287). Benjamin Cruz did not testify at the trial.

The attorneys for both defendants argued in summation, *inter alia*, that Norberto Cruz's testimony was motivated by his belief that the defendants had killed his brother Jerry (T. 306-307, 319; J.A. 55). Counsel for Eulogio Cruz importuned the jurors to follow the court's instruction that Benjamin's confession was not admissible against his client; he maintained that this presented them with a "serious sophisticated problem" (J.A. 55).

The prosecutor argued on summation that Norberto's testimony as to the defendants' statements to him was corroborated by Benjamin Cruz's videotaped responses:

> [What] Norberto Cruz told the police as to what Eulogio Cruz told them and Benjamin Cruz told them is substantiated afterward by Benjamin Cruz himself (J.A. 57).
>
> * * *
>
> Benjamin in his statement corroborates as to what they told [Norberto]. This is afterward, can't get away from it (J.A. 57).

The prosecutor also argued that Norberto's testimony was rendered more convincing by his description of Eulogio's arm wound, since Benjamin's videotaped confession substantiated that Eulogio had been shot in the arm during the robbery (J.A. 58).

During its main charge, the court advised the jury that the statements of each defendant were admissible solely against the declarant (J.A. 59). The court had given similar instructions throughout the course of the trial (T. 22-24, 120-121, 127, 130-131).

After commencing deliberations, the jurors returned to ask for a playback of the videotaped confession and a rereading of all of Norberto Cruz's testimony (J.A. 60). Still later, they requested the definition of "acting in concert" and asked, "If we find one defendant guilty/innocent must we find the other defendant guilty/innocent?" (T. 380). On the second day of deliberations, the jury found both defendants guilty of the only count submitted, felony murder (T. 385-387).

On the date of sentence, counsel for Eulogio moved to set aside the verdict because of the denial of the severance:

> The only testimony against this defendant in this case was a witness who was seeking to revenge [sic] for the death of his brother. Had this defendant been

> tried separately and that testimony be [sic] the only testimony which it was, I can't see how this defendant could possible be convicted beyond a reasonable doubt (minutes of October 31, 1983, p. 2).

Counsel's motion was denied (*id.* at 3).

The court sentenced petitioner to an indeterminate 15-year-to-life term of imprisonment (*id.* at 6). Benjamin Cruz was sentenced to 20 years to life.

State Appeals

On appeal to the intermediate appellate court, the Appellate Division, First Department, of the Supreme Court of the State of New York, petitioner argued, *inter alia*, that the failure to sever deprived him of his Sixth and Fourteenth Amendment right to confrontation. The Appellate Division affirmed the conviction without opinion on October 25, 1984 (J.A. 71).

On October 17, 1985, the Court of Appeals, by a four to two vote, affirmed the Appellate Division's order. In its majority opinion, the court agreed with the trial court's ruling that the disparity in reliability between the defendants' confessions was irrelevant in deciding the *Bruton* question: So long as the confessions interlocked as to factual content, the "interlocking confessions" exception to the *Bruton* rule applied (J.A. 82-83).

In dissent, two judges rejected

> the *per se* rule now established by this case that even an enormous disparity in reliability is not to be considered as a factor in deciding whether confessions interlock. In particular cases where there is a patent danger, as there was here, that the jury may from the inadmissible evidence, impermissibly draw evidence establishing defendant's guilt, then the viable alternative of ordering separate trials should be followed.

> The rationale of *Bruton* is otherwise rendered meaningless (J.A. 90-91).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Pointer* v. *Texas*, 380 U.S. 400 (1965), this Court, in holding the Confrontation Clause of the Sixth Amendment applicable to the states through the Fourteenth Amendment, confirmed that the defendant's right to cross-examine the witnesses against him is crucial to his right of confrontation. Accordingly, unless a codefendant's statement implicating the defendant is subject to cross-examination, or is admissible against the defendant pursuant to a recognized exception to the hearsay rule, *e.g.*, *Dutton* v. *Evans*, 400 U.S. 74 (1970), or because of other indicia of reliability, *Lee* v. *Illinois*, 476 U.S. ___, 90 L. Ed. 2d 514, 54 U.S.L.W. 4555 (June 3, 1986), its admission at a joint criminal trial violates the defendant's rights under the Confrontation Clause.

In this case, the nontestifying codefendant's videotaped confession implicating petitioner was admitted into evidence with the limiting instruction that it was admitted solely against the codefendant. It was not admitted or offered into evidence against petitioner. Nor would such admission have comported with the Confrontation Clause: The videotape neither fit into an established exception to the hearsay rule nor bore any other indicia of reliability.

The videotape's inadmissibility against petitioner does not obviate the Confrontation Clause problem in this case, however, for its admission at the joint trial nonetheless ran afoul of this Court's holding in *Bruton* v. *United States*, 391 U.S. 123 (1968).

In *Bruton*, this Court held that a criminal defendant is deprived of his right to confrontation when a nontestify-

ing codefendant's statement inculpating the defendant is introduced at a joint trial, notwithstanding a limiting instruction to the jury that the statement, inadmissible hearsay against the defendant, binds only the codefendant. 391 U.S. at 126. In *Parker* v. *Randolph*, 442 U.S. 62 (1979), the sitting members of this Court split 4-4 on the issue of whether limiting instructions obviated any Confrontation Clause concern where there were "interlocking" confessions of criminal codefendants.[7]

[7] Although this Court's purpose in granting certiorari in *Parker* was to resolve a conflict in the circuits over whether *Bruton* applies at all to "interlocking confessions" situations, 442 U.S. at 68 n.4, the conflict has continued because of the *Parker* split. Of the circuits that have considered the issue post-*Parker*, at least three have adopted the harmless error standard set forth in Justice Blackmun's concurrence. *United States* v. *Ruff*, 717 F.2d 855 (3d Cir. 1983); *United States* v. *Espericueta-Reyes*, 631 F.2d 616, 624 n.11 (9th Cir. 1980); *United States* v. *Parker*, 622 F.2d 298, 301 (8th Cir. 1980). The Seventh Circuit is openly undecided as to which approach to take. *Montes* v. *Jenkins*, 626 F.2d 584, 587 (7th Cir. 1980). At least three circuits have adopted the plurality reasoning. *United States* v. *Kroesser*, 731 F.2d 1509 (11th Cir. 1984); *Tamilio* v. *Fogg*, 713 F.2d 18 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 706 (1984); *Poole* v. *Perini*, 659 F.2d 730, 733 (6th Cir. 1981).

The same conflict exists in the state courts. *Compare, e.g., State* v. *Haskell*, 100 N.J. 469, 495 A.2d 1341, 1346-1347 (1985); *Scott* v. *State*, 49 Md. App. 70, 430 A.2d 615, 619 (1981); *State* v. *Moritz*, 63 Ohio St. 2d 150, 407 N.E.2d 1268, 1273 (1980); *State* v. *Rodriquez*, 226 Kan. 558, 601 P.2d 686, 690 (1979); *Quick* v. *State*, 599 P.2d 712, 723-725 (Alaska 1979) (adopting harmless error approach), *with State* v. *Thompson*, 308 S.E.2d 364, 366 (S.C. 1983); *Tatum* v. *State*, 249 Ga. 422, 291 S.E.2d 701, 703-704 (1982); *State* v. *Gerlaugh*, 134 Ariz. 164, 654 P.2d 800, 804 (1982); *People* v. *Hartford*, 117 Mich. App. 413, 324 N.W.2d 31, 34 (1982); *Hays* v. *State*, 598 S.W.2d 91, 95 (Ark. 1980) (adopting plurality reasoning).

The *Parker* decision has thus been labeled "inconclusive" in resolving the basic analytical conflict. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 Mich. L. Rev. 1379, 1421 (1979). *See also* Marcus, *The Confrontation Clause and Co-Defendant Confessions: The Drift from Bruton to Parker* v. *Randolph*, 1979 U. Ill. L.F. 559, 580-590.

The *Bruton* rule should be adhered to in interlocking confession situations, subject only to harmless error analysis. 442 U.S. at 77-91 (Blackmun, J., concurring). The foundations of the rule, *i.e.*, the importance of the right to confront the codefendant's accusations, and the human impossibility of the task of following the limiting instructions, are fully applicable whether or not the defendant has himself confessed: Defendants do not forfeit any constitutional protections—including the Confrontation Clause—when they have confessed, and the presence of two confessions rather than one does not enhance the average juror's ability to use each confession only against one of the defendants.

It may very well be that the defendant's own inculpatory statement, in a particular case, will render the error harmless beyond a reasonable doubt, as would untainted overwhelming proof of guilt. *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969). But the fact that the error might not affect the substantial rights of some defendants does not cause the Confrontation Clause violation simply to disappear. It merely renders it harmless in those cases.

Since petitioner Eulogio Cruz was forced to trial with his nontestifying codefendant, and the codefendant's 22-minute detailed videotaped confession came into evidence, albeit with limiting instructions, petitioner was deprived of his Sixth Amendment right to confrontation. That a citizen informant (Norberto Cruz) belatedly claimed that petitioner himself made a factually consis-

tent oral confession to him is a factor to be considered in the harmless error analysis, no more.

Under this analysis, the error was not harmless beyond a reasonable doubt, as the codefendant's confession added substantial weight to the People's case against him. Norberto Cruz's testimony that petitioner confessed to him was the only admissible evidence against petitioner linking him to the homicide. There were, looking solely at that testimony, substantial reasons to doubt that the confession was ever uttered. Since, on the other hand, there was no doubt at all that codefendant Benjamin Cruz's videotaped confession fully inculpating petitioner was made, the jury would naturally look to it to resolve its doubts about Norberto's testimony, limiting instructions notwithstanding. The case against petitioner, in reality a weak one, thus became overwhelming in the jurors' eyes. It simply cannot be said "that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to [Benjamin's videotaped confession] been excluded." *Schneble* v. *Florida*, 405 U.S. at 432.

If this Court should decide, however, in accordance with the reasoning of the *Parker* plurality, that admission of "interlocking" confessions, with limiting instructions, does not violate the Confrontation Clause at all, petitioner is nonetheless entitled to a reversal. His alleged oral confession of dubious reliability did not genuinely "interlock" with Benjamin's videotaped one.

Even where confessions or statements are factually similar to some degree, aspects of a codefendant's statement may damage the defendant's case significantly more than does his own statement. As this Court recently recognized in a related context in *Lee* v. *Illinois*, 476 U.S.

___, 90 L. Ed. 2d 514, 54 U.S.L.W. 4555 (June 3, 1986), a codefendant's statement does not "interlock" with the defendant's own for Confrontation Clause purposes "when the discrepancies between the statements are not insignificant." Just as a defendant may be prejudiced by a significant variance in content between the two confessions, so may he be prejudiced by a variance in reliability. A defendant who may be able to convince a jury that his own inculpatory statement was untrue, involuntary, or never uttered at all has everything to gain by being able to confront his codefendant's statement, even if the latter is worded similarly to his own, in an effort to convince the jury that the codefendant's accusations against him are worthless as well. An inability to confront that accusation would be uniquely damaging to that defendant.

So, too, petitioner's challenge to his own alleged confession, reported by a citizen informant of doubtful credibility with a motive to lie, became almost meaningless when the codefendant's videotaped confession came before the jury. Although petitioner might have been able to convince the jurors that his confession was never uttered, he would never have been able to convince them that the videotaped confession naming him did not exist. Thus, it cannot be concluded that "[s]uccessfully impeaching [Benjamin's videotaped] confession on cross-examination would likely [have] yield[ed] small advantage to [petitioner]," *Parker* v. *Randolph*, 442 U.S. at 73, and genuine interlocking did not exist in this case. Because of the damaging nature of the videotape to petitioner and the otherwise weak case against him, the error in failing to sever cannot be deemed harmless beyond a reasonable doubt.

ARGUMENT

THE INTRODUCTION AT PETITIONER'S JOINT TRIAL OF HIS NONTESTIFYING CODEFENDANT'S CONFESSION, WHICH WAS FAR MORE DAMAGING TO PETITIONER'S CASE THAN PETITIONER'S OWN ALLEGED CONFESSION, VIOLATED THE RULE OF *BRUTON* V. *UNITED STATES*, 391 U.S. 123, THAT SUCH JOINT TRIALS, EVEN WITH LIMITING INSTRUCTIONS THAT THE CODEFENDANT'S CONFESSION IS ADMISSIBLE ONLY AGAINST THE CODEFENDANT, ARE VIOLATIVE OF THE CONFRONTATION CLAUSE.

A. The Admission Of The Nontestifying Codefendant's Confession At A Defendant's Joint Trial Violates The Confrontation Clause, Even Where The Codefendant's Confession Overlaps To Some Degree With The Defendant's Own.

In *Pointer* v. *Texas*, 380 U.S. 400 (1965), this Court, in holding the Confrontation Clause applicable to the states through the Fourteenth Amendment, confirmed "that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him," *id.* at 404, and that "a major reason underlying the constitutional confrontation rule is to give a defendant charged with crime an opportunity to cross-examine the witnesses against him." *Id.* at 406-407. Under this principle, unless a codefendant's statement implicating the defendant is subject to cross-examination, or is independently admissible against the defendant pursuant to a recognized exception to the hearsay rule, *e.g.*, *Dutton* v. *Evans*, 400 U.S. 74 (1970), or because the statement bears other indicia of reliability, *Lee* v. *Illinois*, 476 U.S. ___, 90 L. Ed. 2d 514, 54 U.S.L.W. 4555 (June 3, 1986), its admission at a joint criminal trial violates the defendant's Confrontation Clause rights.

The codefendant's videotaped confession was not admitted or admissible against petitioner. It was, as an evidentiary matter and under settled New York law, hearsay as to petitioner and inadmissible against him. *E.g.*, *People* v. *Marshall*, 306 N.Y. 223, 117 N.E.2d 265 (1954); *see also* Prince, *Richardson on Evidence*, § 232 (10th ed.). The People did not advance the proposition in the state trial or appellate courts that the videotape was admissible against anyone other than its declarant, codefendant Benjamin Cruz, and the trial court accordingly instructed the jury to consider it only as to the codefendant. Furthermore, its admission against petitioner would not have been consistent with the Confrontation Clause. *Bruton* v. *United States*, 391 U.S. at 136 n.12. The videotape fit into no established exception to the rule against hearsay, *e.g.*, *Dutton* v. *Evans*, 400 U.S. 74 (1970), and petitioner had no opportunity to test its truth at any time. *Ohio* v. *Roberts*, 448 U.S. 56 (1980).

Nor was the videotape admissible against petitioner as an "accomplice's confession," since those are presumptively unreliable, *Lee* v. *Illinois*, 54 U.S.L.W. at 4555, and the videotape bore no particular indicia of reliability of its contents to overcome that weighty presumption.[8] While the *modus operandi* described in the videotape was largely consistent with the autopsy report and the physical evidence found at the scene, it bore no indicia of reliability as to its *dramatis personae:* No evidence other than petitioner's own alleged confession cor-

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[8] As a threshold matter, any "accomplice's confession" exception would not apply in this case because the declarant, Benjamin, was not "unavailable" to testify. *See United States* v. *Inadi*, 475 U.S. ___, 89 L. Ed. 2d 390 (1986); *Parker* v. *Randolph*, 442 U.S. at 87 (Stevens, J., dissenting); *Kastigar* v. *United States*, 406 U.S. 441 (1972). *But see Lee* v. *Illinois*, 54 U.S.L.W. at 4560-4561 (Blackmun, J., dissenting).

roborated Benjamin's videotaped claim that petitioner was one of the members of the hold-up team or that he was shot in the arm. Nothing in that videotaped confession precludes the possibility that Benjamin named Eulogio as one of his fellow robbers solely in a slow-witted desire to curry favor with the police (to whom Norberto had already inculpated not only Benjamin but Eulogio as well), or in a desire to avenge himself against his brother. Indeed, the videotaped confession itself circumstantially corroborates that very possibility. In it, Benjamin heaped substantial blame on petitioner—as the one who demanded money, threatened to kill the attendant, fought with and injured the attendant, and fired the first shot—while minimizing his own culpability, as the one who merely shot the attendant to protect his by then unarmed brother from the attendant's own gun. Also, the videotaped confession was untested by any truth-determining process: it was elicited in response to interrogation, without any contemporaneous cross-examination or the equivalent.

Moreover, to say that Benjamin's videotaped confession is reliable because it is corroborated by petitioner's own factually consistent confession is to ignore the substantial evidence, discussed fully *post* at pp. 27-29, that petitioner never uttered this alleged confession at all.[9] Clearly, if the very existence of petitioner's own confession is dubious, that confession can hardly suffice as proof of the reliability of Benjamin's accusation against petitioner.

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[9] In *Lee*, this Court recognized that the defendant's own interlocking confession might supply the proof necessary to establish the reliability of the codefendant's accusation against the defendant. This Court held, however, that the confessions at issue did not truly interlock as to their factual content, and the Court did not otherwise outline the criteria for "interlock." 54 U.S.L.W. at 4558-4559.

Even though the videotaped confession was not admitted into evidence against petitioner, its introduction at the joint trial nonetheless deprived petitioner of his rights under the Confrontation Clause. In *Bruton* v. *United States*, 391 U.S. at 123, this Court held that a criminal defendant is deprived of his right to confrontation when a nontestifying codefendant's statement inculpating the defendant is introduced at a joint trial, notwithstanding a limiting instruction to the jury that the statement binds only the codefendant. The ruling fully applies to petitioner's case.

The *Bruton* ruling was based upon the recognition of two incontrovertible truths: the importance of the right to confrontation, and the inability of jurors to follow limiting instructions that are humanly impossible to follow. Neither proposition is any less true when the defendant has also made an inculpatory statement, as discussed below.

The proposition advanced by the plurality in *Parker* v. *Randolph*, 442 U.S. at 64-76, that the admission of the nontestifying codefendant's statement with limiting instructions is entirely consistent with the Sixth Amendment, so long as the defendant has himself confessed, was apparently based upon two different but related rationales. The first is that cross-examination of the codefendant would "likely yield small advantage" and be of "far less practical value" to the confessing defendant. 442 U.S. at 73. The second is that any inability on the part of the jury to follow the limiting instructions will not be "devastating" to the confessing defendant. *Id.* at 74. Upon close analysis, neither rationale logically supports the plurality's conclusion.

As the *Parker* dissent noted, 442 U.S. at 84, a defendant who has "confessed" is no less entitled to the protec-

tion of the Confrontation Clause than one who has not. The fact that exercising such a right would have "yield[ed] small advantage" does not mean that the right never existed, any more than a criminal defendant who has been denied his Sixth Amendment rights to be represented by counsel or testify on his own behalf at his trial has forfeited those rights simply because his guilt is so clearly made out by his own confession that exercising them would have "yield[ed] [him] small advantage." Moreover, it simply cannot be posited that once a defendant has "confessed," the outcome of the trial is a foregone conclusion and the exercise of his right to confrontation would be fruitless. Petitioner's case is a prime example: the mere fact that a third party attributed a confession to him did not so damn him that any efforts to dispute his guilt would have been fruitless; if anything damned him, it was his inability to confront his brother's accusations.

The second prong of the plurality's analysis also does not bear close scrutiny. If jurors will be unable to disregard a codefendant's statements if the defendant has remained silent, neither will they be able to do so if the defendant has made an inculpatory statement; the jury's improper *use* of the codefendant's confession remains a constant. The plurality's reasoning did not seriously dispute this; rather, it asserted that the impact of the jurors' inability to keep the confessions separate will not be "devastating" when the defendant has himself confessed. 442 U.S. at 74.

Again, this assertion and, indeed, the animating assumption of the entire *Parker* plurality's decision, relies on the perceived "probative" weight of an "unchallenged" confession.[10] Certainly, that assumption is inapplicable to

[10] Thus, the plurality asserted that the "most probative" piece of evidence is a defendant's own confession, that "one can scarcely

a case, such as the instant one, where a defendant does in fact maintain his innocence at trial and directly attacks the validity and even the existence of the "confession." In such a case, presumptions of probative weight are inappropriate, and the extent to which a defendant has been convicted by his own confession or devastated by a codefendant's accusation requires an *ad hoc* determination by the reviewing court, under a traditional harmless error analysis. As the *Parker* dissent noted, 442 U.S. at 86, a confession is not necessarily more conclusive than fingerprint, photographic, or other untainted evidence of guilt. When a nonconfessing defendant is confronted with such overwhelming evidence, we do not say that he has forfeited the right to confront any witness against him. If a *Bruton* error occurs at such a trial, to say that it is harmless does not mean that it never occurred at all.

In particular cases, an appellate court will determine that a *Bruton* violation did not affect the outcome of the trial, and will affirm the conviction. The affirmance results not because the potential for prejudice recognized in *Bruton* never existed, but because the potential for prejudice was not realized in that case: Either the damaging nature of the defendant's own confession or the overwhelming untainted proof of guilt rendered the error harmless beyond a reasonable doubt. *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969).[11]

imagine evidence more damaging to his defense than his own admission of guilt," and that the defendant who tenders an "unchallenged" confession differs dramatically from one who "maintain[s] his innocence." *Id.* at 72-73.

[11] The question whether to adopt a harmless error standard or a *per se* rule is not merely "a legal nicety" despite the fact that the focus of inquiry for *appellate* courts, *i.e.*, whether confessions truly "inter-

In short, the full force of the *Bruton* ruling should apply even if it happens that the defendant has also made an

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lock," may be the same. *E.g.*, *Metropolis* v. *Turner*, 437 F.2d 207, 208 (10th Cir. 1971). The question is of great importance to *trial* judges confronted with a pretrial motion to sever. As at least two courts have recognized, those judges should not be expected to sanction, prior to trial, commission of constitutional error by failing to sever, on the theory that an appellate court will most likely deem it harmless because confessions appear to interlock. *State* v. *Bleyl*, 435 A.2d 1349, 1363 (Me. 1981); *United States* v. *Corbin Farm Service*, 444 F. Supp. 510, 540 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978).

Moreover, requiring trial judges to determine pretrial whether a joint trial will prejudice either confessing defendant puts the judge in an impossible situation, since pretrial appearances notwithstanding, the course of trial may reveal that two confessions do not truly interlock, with a reversal as a possible result. *See State* v. *Waterbury*, 307 N.W.2d 45, 49 (Iowa 1981); *State* v. *Bleyl*, *supra*, at 1363; *Quick* v. *State*, 599 P.2d 712, 723-725 (Alaska 1979). For example, a judge deciding a pretrial motion to sever is not in a position to determine whether a defendant who has been unsuccessful in a pretrial motion to suppress his confession as involuntary will be more successful in mounting the same "challenge" directly to the jury, as he has the option to do. *Crane* v. *Kentucky*, 476 U.S. ____, 90 L. Ed. 2d 636, 54 U.S.L.W. 4598 (June 10, 1986).

For these reasons, a number of jurisdictions have endorsed the position that, if effective redaction is impossible, judges confronted with potential *Bruton* situations should follow the reasonable and readily available course of severing, without trying to parse out whether confessions truly interlock. *See State* v. *Haskell*, 100 N.J. 469, 495 A.2d 1341, 1346-1347 (1985); *State* v. *Pacheco*, 481 A.2d 1009, 1017-1019 (R.I. 1984); *State* v. *Moritz*, 63 Ohio St. 2d 150, 407 N.E.2d 1268, 1273 (1980). But even if the "interlocking" determination is one to be made pretrial (*see* Part C, *post*, at p. 30), there is no sound reason to artificially narrow the judge's focus to whether confessions factually overlap, rather than permit the judge to decide the broader question of whether one defendant's confession will cause substantial prejudice to the other defendant.

"interlocking" confession. As Justice Blackmun succinctly stated in his *Parker* concurrence, 442 U.S. at 79:

> I would not adopt a rigid *per se* rule that forecloses a court from weighing all the circumstances in order to determine whether the defendant in fact was unfairly prejudiced by the admission of even an interlocking confession. Where he was unfairly prejudiced, the mere fact that prejudice was caused by an interlocking confession ought not to override the important interests that the Confrontation Clause protects.
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> The fact that confessions may interlock to some degree does not ensure, as a *per se* matter, that their admission will not prejudice a defendant so substantially that a limiting instruction will not be curative. The two confessions may interlock in part only. Or they may cover only a portion of the events in issue at the trial. Although two interlocking confessions may not be internally inconsistent, one may go far beyond the other in implicating the confessor's codefendant. In such circumstances, the admission of the confession of the codefendant who does not take the stand could very well serve to prejudice the defendant who is incriminated by the confession, notwithstanding that the defendant's own confession is, to an extent, interlocking.

Accordingly, in determining whether to sustain a defendant's conviction after a joint trial, in which his nontestifying codefendant's confession inculpating the defendant has been admitted into evidence with limiting instructions, the ultimate question should not be whether the defendant has confessed or whether his statement "interlocks" with that of his codefendant. Instead, it must be recognized that the defendant has been denied the right to confront the evidence considered against him by the jury, and the test for whether the resultant conviction

can stand is simply whether the defendant has suffered substantial prejudice. If so, the violation of his Confrontation Clause rights cannot be harmless error.

B. The Confrontation Clause Violation Is Not Harmless Where The Codefendant's Confession Adds Substantial Weight To The Case Against The Defendant.

In determining whether a Confrontation Clause violation of this type is harmless beyond a reasonable doubt, the question is simply whether the defendant has suffered substantial prejudice by the codefendant's confession coming before the jury. To deem such an error harmless, then, the court must find either (a) that there was nothing in or about the codefendant's confession which significantly damaged the defendant's case any more than did the defendant's own confession or (b) that the other untainted evidence of guilt was overwelming, so that any damage done to the defendant's case could not have affected the verdict. *Schneble* v. *Florida*, 405 U.S. at 427; *Harrington* v. *California*, 395 U.S. at 250. In neither respect can the error in petitioner's case be judged harmless.

Taking the second prong of this analysis first, the untainted admissible evidence against petitioner was weak; indeed, apart from his own alleged confession to Norberto, there was none. Although there was ample physical evidence at the scene and from the autopsy to establish that a felony murder had been committed, no evidence linked either defendant to the crime except the statements introduced against them. No eyewitnesses or physical evidence placed them at the scene. Neither any instrumentality nor any proceeds of the crime were recovered.

Thus, the People's case against petitioner rested entirely on the jury's finding that petitioner's alleged

statement to Norberto, in which petitioner confessed to felony murder, was actually made. In making this determination, the jurors would naturally look to the videotape to resolve their doubts. Accordingly—looking now at the first prong of the harmless error analysis—it is in this way that Benjamin's videotaped confession inculpated petitioner far more than did petitioner's alleged confession.

Considering petitioner's alleged confession by itself, the jury had ample reason to doubt Norberto's testimony that it ever occurred. Norberto reported nothing of petitioner's alleged statement until some five months after the fact, after his brother Jerry had been murdered and petitioner, as Norberto stated, "tried to take me to the place where they had killed my brother" (J.A. 46). As counsel for petitioner argued on summation (T. 319), Norberto had every reason to try to frame petitioner to avenge petitioner's suspected involvement in his brother's murder.[12] Moreover, Norberto was an inherently unreliable witness with no demonstrated sense of honesty. He had a prior record; received welfare payments even as he

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[12] Although Norberto's prior silence to the police may have been partially motivated by his brother Jerry's membership in the robbery team, the fact of that membership did not clearly come before the jury in evidence admissible against petitioner. Apart from Norberto's testimony about Benjamin's statement to him the day after the crime about cleaning up the car, a statement not admissible against petitioner, Norberto did not testify as to whether his brother Jerry was part of the robbery team. Attempts to elicit such testimony were singularly unsuccessful: When asked on cross why he did not go to the police sooner, Norberto testified that it was because his brother "had the event" (J.A. 45). Neither the lawyers nor the court thought it clear what that statement meant (J.A. 45). Only in the context of Benjamin's statement to Norberto on November 30th and his videotaped confession could it have made sense to the jury, but neither was evidence admissible against petitioner.

plied his trade "on the street" as a mechanic; and took household expense money from his brother Jerry, a professional felon, without (he claimed) asking him about the source of the money. The likelihood that Norberto would fabricate these confessions is circumstantially confirmed by the fact that no reason appears why petitioner and Benjamin would choose to confess to Norberto during what was apparently a casual social call.[13] Most significant, however, in impeaching both Norberto's general credibility and his specific accusation that petitioner had confessed, is the fact (emphasized in counsel's summation [T. 321-322]) that his prior testimony attributed the only confession to Benjamin, not petitioner.

Significantly, there is nothing about the confession attributed to petitioner which demonstrated that it could have come only out of petitioner's mouth. Although the sparse detail contained in the alleged confession (that the victim "bent down" while Benjamin "jumped up and fired") was in some ways consistent with the physical evidence (both bullets followed a "downward" path), such minimal detail could have been based upon second-hand information about the crime that Norberto obtained from someone other than petitioner—for example, Norberto's brother Jerry, a member of the robbery team, or even Benjamin Cruz by himself. For the same reason, Norberto's description of a wound to petitioner's right arm, in the absence of any evidence apart from Benjamin's con-

[13] Although the purpose of the visit by Eulogio and Benjamin might be explained as their picking up their partner in crime, Jerry Cruz, rather than as a casual social call, that explanation would not have been apparent to the jury without evidence that Jerry Cruz was a member of the robbery team. As explained *ante*, n. 12, no such evidence came in on the People's case against petitioner, as opposed to their case against Benjamin.

fession[14] that petitioner ever suffered an arm wound, is corroborative of nothing.

Given the doubts that the jurors may well have had about whether petitioner confessed at all, it is natural that they would have looked to Benjamin's 22-minute detailed confession to resolve those doubts. That confession was memorialized on videotape by the District Attorney's Office. It would be hard to imagine a recording method that would inspire greater confidence that the confession had actually been uttered. In fact, the prosecutor on summation, the court's limiting instructions notwithstanding, repeatedly urged that corroboration of Norberto's testimony about Eulogio's statement could be found in Benjamin's subsequent videotaped confession (J.A. 57).

In short, because Norberto's testimony was the sole link between petitioner and the homicide, the case against him was by no means "overwhelming" and was actually quite weak: Petitioner for no apparent reason confessed to murder to an unreliable informant who, solely to avenge his brother's death, five months later turned petitioner over to the police. The introduction of the videotaped confession, while technically admissible solely against Benjamin, made the case against both defendants appear overwhelming. Certainly, it cannot reasonably be concluded "that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony as to [Benjamin's videotaped confession] been excluded." *Schneble* v. *Florida*, 405 U.S. at 432. The error not being harmless, there must be a reversal.

[14] In Benjamin's videotaped confession, he stated that Eulogio was wounded in the *left* arm (J.A. 67).

C. Even If The Admission of The Nontestifying Codefendant's Confession Does Not Violate The Confrontation Clause If It "Interlocks" With The Defendant's Own Confession, Confessions Do Not "Interlock" If There Is Anything In Or About The Codefendant's Confession That Inculpates The Defendant Significantly More Than Does The Defendant's Own Confession.

If this Court should adopt a *per se* rule that *Bruton* does not apply in an interlocking confession situation, it should nonetheless not abandon the inquiry into whether the confessions genuinely interlock. Furthermore, where there is a significant difference between the two confessions, so that the codefendant's is uniquely damaging to the defendant's case, it should not matter that the prejudice results from a vast difference in the reliability of the confessions, rather than from the words contained in them.

In *Parker*, the plurality determined that the protection afforded by *Bruton* was of little value to a defendant "whose own admission of guilt stands before the jury unchallenged" and who "has corroborated his codefendant's statements by heaping blame onto himself." 442 U.S. at 73. Thus, where confessions were "interlocking," *id.* at 75, *Bruton* simply did not apply. The plurality made no attempt to delineate when codefendants' statements would interlock sufficiently to come within this exception, or indeed, whether they need interlock at all if the defendant has himself confessed. *Id.* at 79-80 (Blackmun, J., concurring). Similarly left open were questions as to how inculpatory a statement had to be before it qualified as a "confession," "extrajudicial admission of guilt," or a "statement[] . . . heaping blame onto [oneself]," or what constituted an "unchallenged" confession. *Id.* at 82 n.2 (Stevens, J., dissenting).

The Court's recent decision in *Lee* v. *Illinois*, 476 U.S. ___, 90 L. Ed. 2d 514, 54 U.S.L.W. 4555 (June 3, 1986), shed light on some of these questions. Although *Lee* did not involve a *Bruton* question, it did clarify when statements were similar enough in content so that they would be deemed mutually corroborative for Confrontation Clause purposes. The focus in *Lee* shifted from whether the defendant himself "confessed" to whether the codefendant's statement implicated the defendant significantly more than did the defendant's own statement. To comport with the Sixth Amendment, the Court held, those portions of the codefendant's statement which incriminate the defendant must be "thoroughly substantiated" by the defendant's own statement, and "when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." 54 U.S.L.W. at 4559-4560. In the same spirit, courts which have adopted the *Parker* plurality reasoning have nonetheless held that statements do not "interlock" where the codefendant's confession went further in implicating the defendant than did the defendant's own statement, *State* v. *Smith*, 117 Wis. 2d 399, 344 N.W.2d 711, 717 (1983), or where each confession attempts to shift the blame onto the other defendant. *State* v. *Robinson*, 622 S.W.2d 62 (Tenn. Cr. App. 1981).

If statements do not truly interlock where the significant differences in content affect the defendant's Confrontation Clause rights, so too should they not interlock if the prejudice is caused by significant differences in reliability, whether the difference in reliability gives rise to a substantial "challenge" to the voluntariness or truth of the defendant's confession, or to whether it was made at all. When a defendant's statement inculpates him less than does the codefendant's, the importance to the

defendant of an opportunity to confront the codefendant's statement is the same whether the difference in culpability rests in content or reliability. In both situations, the defendant has everything to gain by impeaching the codefendant's version since, if the jury disbelieves that version, the defendant's case stands to benefit.

The great difference in reliability that the confessions in this case were actually uttered (see discussion *ante* at pp. 27-29) was acknowledged by the State courts but deemed irrelevant to the Confrontation Clause question. This difference was in fact crucial, since it meant that the jury would naturally look to Benjamin's videotaped confession to resolve its doubts about petitioner's own alleged confession. Under such circumstances, Benjamin's videotaped confession was far more damaging to petitioner's case than his own, and rendered the People's case against him far more persuasive. Since it cannot be said that "[s]uccessfully impeaching [Benjamin's videotaped] confession on cross-examination would likely [have] yield[ed] small advantage to [petitioner]," *Parker* v. *Randolph*, 442 U.S. at 73, petitioner's alleged confession does not truly "interlock" with the one on videotape.

Since there is no genuine interlocking in this case, the only remaining question is whether the failure to sever was harmless error in light of the untainted admissible evidence against petitioner. As previously stated (*ante* at p. 26), there was no evidence proving petitioner's identity as one of the participants in the robbery/homicide except for his own alleged confession; moreover, the only evidence that the confession was made at all came from an unreliable witness with a motive to fabricate. Under such circumstances, the error cannot be considered harmless beyond a reasonable doubt.

CONCLUSION

The judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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